

SS-8 Determination—Determination for Public Inspection

Occupation 02CSP Computer Services Personnel	Determination: <input checked="" type="checkbox"/> Employee <input type="checkbox"/> Contractor
UILC	Third Party Communication: <input checked="" type="checkbox"/> None <input type="checkbox"/> Yes

I have read Notice 441 and am requesting:

- Additional redactions based on categories listed in section entitled "Deletions We May Have Made to Your Original Determination Letter"
- Delay based on an on-going transaction
- 90 day delay

For IRS Use Only:

Facts of Case

The worker initiated the request for a determination of his work status as a remote computer software installer in tax years 2015 through 2017, stating he was a software engineer. The firm's business is described as sales and installation services of software to US military and US government agencies. The worker indicated he spoke with the firm on several occasions about being on a W-2; he was issued Form 1099-MISC to report his earnings.

The firm's response was signed by the firm's president. The firm's business is described as software development, sales, and service. The worker performed services as hourly computer support services at the office. Tasks included computer set-up and configuration and system testing and maintenance. The worker was offered a job with the firm; but, he chose to remain on a contract basis.

According to the firm, there were no specific trainings and instructions given to the worker. He was assigned specific tasks to make use of his computer skills. The worker was to rely on his skills to determine the methods by which the assignments were performed. Any problems or complaints encountered by the worker were directed to the firm's president for resolution. All work was to be performed at the firm's location from 8:30 am to 4:30 pm. The worker was required to perform the services personally.

The worker indicated he was given specific training and instructions from the firm's owner and a manager as to how to perform patch updates and their special software installation. His job assignments came from the firm's manager, CEO, and owner. The firm determined the methods by which the worker's services were performed and any problems or complaints encountered by the worker were directed to the firm for resolution. The worker was required to submit a weekly services report. The worker's services were rendered on firm's premises unless extreme weather conditions existed and he was allowed to work from home. The worker was required to perform the services personally.

Both parties concurred the firm provided office space, computers, servers, intranet, and a firm-email address. The worker furnished nothing other than computer-related skills. The worker did not lease equipment and did not incur expenses in the performance of the job. The worker was paid an hourly wage, not to exceed 40 hours per week which was paid every two weeks. The customers paid the firm. The worker was covered under the firm's workers' compensation insurance policy. Both parties agreed the worker was not at risk for a financial loss in this work relationship.

The firm and worker acknowledged there were no benefits extended to the worker and that either party could terminate the work relationship without incurring a liability or penalty. The worker and firm stated he was performing same or similar services for others during the same time frame and he was not required to get the firm's approval. The worker was provided with a company shirt. Both parties provided a copy of the Contractor Service Agreement, confidentiality agreement, non compete agreement and intellectual property assignment (January 2017) with Schedule A that outlined compensation of \$XX/hour not to exceed 40 hours per week. The firm stated the worker was referred to as a support technician when he interfaced with customers.

Analysis

A worker who is required to comply with another person's instructions about when, where, and how he or she is to work is ordinarily an employee. This control factor is present if the person or persons for whom the services are performed have the right to require compliance with instructions. Some employees may work without receiving instructions because they are highly proficient and conscientious workers or because the duties are so simple or familiar to them. Furthermore, the instructions, that show how to reach the desired results, may have been oral and given only once at the beginning of the relationship.

If the services must be rendered personally, presumably the person or persons for whom the services are performed are interested in the methods used to accomplish the work as well as in the results.

A continuing relationship between the worker and the person or persons for whom the services are performed indicates that an employer-employee relationship exists. A continuing relationship may exist where work is performed in frequently recurring although irregular intervals.

The establishment of set hours of work by the person or persons for whom the services are performed is a factor indicating control. If the nature of the occupation makes fixed hours impractical, a requirement that workers be on the job at certain times is an element of control.

If the work is performed on the premises of the person or persons for whom the services are performed, that factor suggests control over the worker, especially if the work could be done elsewhere. Work done off the premises of the person or persons receiving the services, such as at the office of the worker, indicates some freedom from control. However, this fact by itself does not mean that the worker is not an employee. The importance of this factor depends on the nature of the service involved and the extent to which an employer generally would require that employees perform such services on the employer's premises.

Payment by the hour, week, or month generally points to an employer-employee relationship, provided that this method of payment is not just a convenient way of paying a lump sum agreed upon as the cost of a job. In such instances, the firm assumes the hazard that the services of the worker will be proportionate to the regular payments. This action warrants the assumption that, to protect its investment, the firm has the right to direct and control the performance of the workers. Also, workers are assumed to be employees if they are guaranteed a minimum salary or are given a drawing account of a specified amount that need not be repaid when it exceeds earnings.

A person who can realize a profit or suffer a loss as a result of his or her services is generally an independent contractor, while the person who cannot is an employee. "Profit or loss" implies the use of capital by a person in an independent business of his or her own. The risk that a worker will not receive payment for his or her services, however, is common to both independent contractors and employees and, thus, does not constitute a sufficient economic risk to support treatment as an independent contractor. If a worker loses payment from the firm's customer for poor work, the firm shares the risk of such loss. Control of the firm over the worker would be necessary in order to reduce the risk of financial loss to the firm. The opportunity for higher earnings or of gain or loss from a commission arrangement is not considered profit or loss.

For federal employment tax purposes, it is the actual working relationship that is controlling and not the terms of the contract (oral or written) between the parties.

We have considered the information provided by both parties to this work relationship. In this case, the firm retained the right to change the worker's methods and to direct the worker to the extent necessary to protect its financial investment and business reputation and to ensure its customers' satisfaction and that its contractual obligations were met. The worker was not operating a separate and distinct business; the worker did not invest capital or assume business risks, and therefore, did not have the opportunity to realize a profit or incur a loss as a result of the services provided. Integration of the worker's services into the business operations generally shows that the worker is subject to direction and control. When the success or continuation of a business depends to an appreciable degree upon the performance of certain services, the workers who perform those services must necessarily be subject to a certain amount of control by the owner of the business. In this case, the worker was not engaged in an independent enterprise, but rather the services performed by the worker were a necessary and integral part of the firm's business.

CONCLUSION

Based on the above analysis, we conclude that the firm had the right to exercise direction and control over the worker to the degree necessary to establish that the worker was a common law employee, and not an independent contractor operating a trade or business.